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**Federal Communications Commission
Office of Secretary**

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SUMMARY

The Telecommunications Act of 1996 ("1996 Act") articulates and establishes a Congressional policy in favor of opening all telecommunications markets to competition. Congress made the FCC principally responsible for implementing this policy, but reserved certain specific functions to the state public service commissions ("state PSCs"). Thus, Congress' goal of an open and competitive market for telecommunications services is to be achieved through the joint, cooperative effort of the FCC and the state PSCs.

The Arkansas State Legislature apparently does not share Congress' enthusiasm for full competition in the market for telecommunications services. In fact, the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"), which was enacted by the Arkansas State Legislature earlier this year, affirmatively seeks to blunt the pro-competitive impact of the 1996 Act wherever possible, by directing the Arkansas Public Service Commission ("Arkansas PSC") to do no more, approve no more, and permit no more than is expressly mandated by Congress and the FCC.

For example, the Arkansas Act states that:

- "In no event shall the [Arkansas PSC] impose any interconnection requirements that go beyond those requirements imposed by the Federal Act;" and,
- "Except to the extent required by the Federal Act and this Act, the [Arkansas PSC] shall not require an [incumbent local exchange carrier] to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a [competitive local exchange carrier] for the purpose of allowing such [competitive local exchange carrier] to compete with the [incumbent local exchange carrier] in the provision of basic local exchange service."

The Arkansas Act also contains restrictive eligibility requirements that effectively preclude new entrants from qualifying as Eligible Telecommunications Carriers ("ETCs") and participating as recipients of universal service support.

The Arkansas Act is replete with other examples of the Arkansas State Legislature's intent to thwart and contradict the 1996 Act and the FCC's implementation orders. As a result, the Arkansas State Legislature, by enacting the Arkansas Act at the behest of incumbent local exchange carriers ("LECs") in the state, has constructively abolished the Arkansas PSC's role in implementing the 1996 Act, and erected formidable barriers to entry into the market for local telecommunications services.

In obvious anticipation of petitions for preemption, the Arkansas Act attempts to reconcile its anticompetitive mandates by the liberal usage of "to the extent required by the Federal Act" and similar phrases. This effort fails, however, because the structure of the 1996 Act sets broad policy guidelines and then assigns the FCC and the state PSCs the task of implementing them. It is a scheme which directs the FCC, in conjunction with state regulators, to nurture competition to the *maximum* extent possible. The Arkansas Act, in contrast, orders the Arkansas PSC to take action that promotes competition only to the *minimum* extent required. These two conflicting policy goals cannot be reconciled.

The critical manifestation of this conflict is found in the need for ongoing supervision of the interconnection and unbundling processes. The Arkansas Act prohibits the Arkansas PSC from ordering interconnection or unbundling beyond that already mandated by the FCC. This restraint eliminates any ability of the Arkansas PSC to participate meaningfully in the continuing process of implementation and interpretation of the 1996 Act. Unless the FCC has already said "yes" to a bona fide request, the Arkansas PSC *must* say

"no." This is not the independent review by the PSC which the Congress contemplated in enacting the 1996 Act.

The Arkansas Act also undermines universal service reform. By compelling the Arkansas PSC to adopt eligibility requirements for qualification as ETCs which conflict with corresponding requirements of the 1996 Act, the Arkansas Act prevents new entrants from participating in either the state or federal universal service support programs. By effectively disqualifying new entrants from participation in the Arkansas state universal service program, while guaranteeing incumbent LECs a place in the system, the Arkansas Act affords incumbent LECs an insuperable competitive advantage. Namely, incumbent LECs will be able to draw funding from two sources of universal service support, while new entrants are relegated to a single program. This circumstance will constitute a formidable barrier to entry in the relevant local services markets.

In such situations, the 1996 Act empowered the FCC to preempt the states through two separate provisions. Section 252(e)(5) allows the FCC to preempt state PSCs when they fail to act, and Section 253(d) permits the federal preemption of state laws that restrict competitive entry. This Petition asks that the FCC exercise this preemptive authority and declare that all tasks assigned to the Arkansas PSC by the 1996 Act will be performed by the FCC.

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MAR 25 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**Federal Communications Commission
Office of Secretary**

In the Matter of)	
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American Communications Services, Inc.)	
)	
Petition for Expedited Declaratory)	File No.
Ruling Preempting Arkansas Public)	
Service Commission Pursuant to Section)	
252(e)(5) of the Communications Act)	
of 1934, as amended)	

To: The Commission

PETITION FOR DECLARATORY RULING

Pursuant to Sections 252(e)(5), 253(d) and 254(f) of the Communications Act of 1934 (the "Communications Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"),^{1/} and pursuant to Section 1.1 and 1.2 of the rules and regulations of the Federal Communications Commission ("FCC"),^{2/} American Communications Services, Inc. ("ACSI"), by its attorneys, hereby respectfully requests that the Commission issue a declaratory ruling preempting the Arkansas Public Service Commission ("Arkansas PSC") from arbitrating and approving interconnection agreements, and from refusing requests by competitive local exchange carriers ("CLECs") for designation as carriers qualified to receive universal service support. The Arkansas Telecommunications Regulatory Reform Act of

^{1/} 47 U.S.C. § 252(e)(5) (1996).

^{2/} 47 C.F.R. §§ 1.1, 1.2 (1995).

1997 (the "Arkansas Act")^{3/} has eliminated the Arkansas PSC's authority to consider the full range of interconnection options permissible under the 1996 Act, and has prohibited the Arkansas PSC from designating new entrants as Eligible Telecommunications Carriers ("ETCs") for universal service support that qualify as such under the terms of the 1996 Act. As a result, the Arkansas Act has removed the Arkansas PSC's legal ability to fulfill its statutory responsibilities under the 1996 Act. Therefore, ACSI respectfully requests that the FCC preempt the authority of the Arkansas PSC to arbitrate and approve interconnection agreements pursuant to Section 252(e)(5) of the Communications Act,^{4/} or to certify CLECs as ETCs pursuant to Section 5 of the Arkansas Act and Section 214(e) of the Communications Act,^{5/} and declare that such approvals, arbitrations and certifications pertaining to Arkansas will instead be carried out by the FCC. This action also is supported by Section 253(d),^{6/} which permits FCC preemption of state laws and rules which have the effect of prohibiting the ability of any entity to provide any telecommunications service.

I. BACKGROUND

A. STATEMENT OF INTEREST

ACSI is a provider of integrated local voice and data communications services to customers primarily in mid-size metropolitan markets in the southern United States. ACSI is a rapidly growing CLEC, supplying businesses with advanced telecommunications services

^{3/} Copy attached as Attachment 1.

^{4/} 47 U.S.C. § 252(e)(5).

^{5/} *Id.* at § 214(e).

^{6/} *Id.* at § 253(d).

through its digital SONET-based fiber optic local networks. ACSI already has constructed and is successfully operating networks and offering dedicated telecommunications service in many states, including Arkansas. At present, ACSI has 24 operational networks, including one in Little Rock, Arkansas,^{7/} and an additional 12 networks under construction.

The Arkansas Act will have a significant material adverse impact on ACSI to the extent that it limits the options available to the Arkansas PSC in considering and imposing interconnection requirements above and beyond those established by the 1996 Act and the FCC's *Local Competition Order*.^{8/} ACSI has negotiated and arbitrated an interconnection agreement with Southwestern Bell Telephone Company ("SWBT") in Arkansas. Pursuant to that agreement, ACSI has invested several million dollars in a local fiber optic network serving Little Rock, Arkansas. The ACSI-SWBT interconnection agreement expires in 1998, at which time it will have to be renegotiated. If this Petition is not granted, ACSI has grave concerns about its ability to obtain a satisfactory renewal of its interconnection agreement. Moreover, without FCC action, ACSI will be unable to obtain additional unbundled network elements from SWBT through the use of the *bona fide* request process, and will be unable to provide new services that require additional unbundled network elements. Moreover, its effective disqualification from ETC status will place ACSI at a significant competitive disadvantage *vis-a-vis* the incumbent LECs and significantly impair its ability to compete for local services traffic in Arkansas.

^{7/} ACSI provides service in Little Rock through its operating subsidiary, American Communication Services of Little Rock, Inc.

^{8/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (1996) ("*Local Competition Order*").

B. THE ARKANSAS ACT

The 1996 Act was passed by Congress and signed by the President of the United States for the express purpose of encouraging, nurturing and facilitating the development of competition in the provision of local telecommunications services. The 1996 Act establishes local competition as an important federal policy. As described by the preamble to the Conference Report on the 1996 Act, the law is meant

to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*^{9/}

Recognizing the traditional state-federal division of regulatory jurisdiction over telecommunications services, Congress structured the process of implementing the 1996 Act to include involvement by state public service commissions ("state PSCs"), although the FCC is primarily responsible for implementing the 1996 Act. Section 252 enlists the support of the state PSCs in furthering the 1996 Act by assigning them the task of approving and arbitrating interconnection agreements. In so doing, the state PSCs are required to consider Congress' goals and policies embodied in the 1996 Act, and may reject an agreement if they find "that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251" ^{10/} The state PSCs also may reject an agreement under the 1996 Act if, in the judgment of the state commission, any portion of the contract discriminates against a carrier not a party to the agreement or is "not consistent

^{9/} Conference Report, Rep. No. 104-458 at 1 (emphasis added).

^{10/} 47 U.S.C. § 252(e)(2)(B).

with the public interest, convenience and necessity."^{11/} Obviously, the state PSCs have been given a substantial role in implementing and enforcing the pro-competitive federal policy.

The Arkansas Act establishes state goals directly contrary to the federal objectives for local interconnection articulated in the 1996 Act. For example, the Arkansas Act:

- states that "in no event" shall the PSC "impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act";^{12/}
- precludes the Arkansas PSC from requiring incumbent LECs to permit resale of local services, to provide interconnection, or to sell unbundled network elements "except to the extent required by the Federal Act";^{13/}
- directs that CLECs shall have the ability to obtain from incumbent LECs operator services, directory listings and 911 services "only to the extent required in the Federal Act";^{14/}
- mandates that the PSC "shall approve" incumbent LEC statements of generally available terms and conditions unless shown by "clear and convincing evidence" that the statement fails to meet the minimum requirements of the federal 1996 Act;^{15/} and
- prevents participation by intervenors in arbitration proceedings, severely limiting the PSC's ability to gauge the potential for discrimination against non-parties.^{16/}

^{11/} *Id.* at § 252(e)(2)(A).

^{12/} Arkansas Act § 9(i).

^{13/} *Id.* at § 9(d).

^{14/} *Id.* at § 9(h).

^{15/} *Id.* at § 9(i).

^{16/} *Id.* at § 9(j).

The Arkansas Act also establishes state requirements for designation of "other telecommunications providers" (*i.e.*, providers other than incumbent LECs) as ETCs that are inconsistent with the express corresponding eligibility requirements contained in the 1996 Act. Specifically, the Arkansas Act:

- forbids the Arkansas PSC from designating any other telecommunications provider as an ETC until such provider "accepts the responsibility to provide service to all customers" in an incumbent LEC's local exchange area using its "own facilities" at least in part, and "offers to serve all customers in its service area";^{17/}
- instructs the Arkansas PSC to restrict other telecommunications providers from receiving universal service funding other than "for the portion of its facilities that it owns and maintains";^{18/} and
- requires the Arkansas PSC to make an affirmative determination that designation of an other telecommunication provider as an ETC is "in the public interest," in both rural and non-rural areas.^{19/}

Finally, the Arkansas Act includes numerous other provisions directed against competitive entrants, such as deregulation of incumbent LECs any time a local competitor enters the market, and mandatory PSC approval of resale restrictions. In essence, the Arkansas Act reflects a state policy of passive resistance to implementation of the 1996 Act and its pro-competitive goal, and restrains the Arkansas PSC regardless of the views of the Arkansas PSC on the merits of particular interconnection agreements or policies.

^{17/} *Id.* at § 5(b)(1).

^{18/} *Id.* at § 5(b)(2).

^{19/} *Id.* § 5(b)(5).

II. DISCUSSION

A. THE ARKANSAS ACT PREVENTS THE ARKANSAS PSC FROM FULFILLING ITS DUTIES UNDER THE COMMUNICATIONS ACT

1. State PSCs Have A Critical Role to Play in the Evolution of Local Competition

Both the Communications Act and the *Local Competition Order* contemplate a significant role for the states in fostering local competition under Sections 251 and 252. In the *Local Competition Order*, for example, the FCC asserted that the 1996 Act "forges a new partnership between state and federal regulators" that is "far better suited to the coming world of competition."^{20/} The FCC further observed that, in this new partnership, the "states will play a critical role in promoting local competition" by performing a key function in the negotiation and arbitration process.^{21/}

Under the 1996 Act, this partnership between the FCC and the states is dynamic. Thus, the FCC has recognized that, "[u]nder the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services *beyond the rules the Commission establishes in [the Local Competition Order]*."^{22/} As a result, the FCC specifically envisioned that the *Local Competition Order* would serve as a baseline for negotiations for interconnection arrangements, rather than a comprehensive articulation of the regulatory requirements for interconnection, resale and access to unbundled network elements.

^{20/} *Local Competition Order* at ¶ 2.

^{21/} *Id.* at ¶ 133.

^{22/} *Id.* at ¶ 135 (emphasis added).

The influence of the states in promoting competition will be exercised principally through the arbitration process. As the FCC observed in the *Local Competition Order*:

State commissions will make critical decisions concerning a host of issues involving rates, terms and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. *The actions taken by a state will significantly affect the development of local competition in that state.* Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.^{23/}

2. The Arkansas Act Constructively Abolishes the Arkansas PSC's Role in Implementing the Local Interconnection Requirements of the 1996 Act

The Arkansas Act constitutes an attempt to resist local competition by creating roadblocks to competitors while simultaneously deregulating incumbent LECs. Although the Arkansas Act is written in terms calculated to appear consistent with the federal 1996 Act (e.g., "except to the extent required by the Federal Act"), upon closer examination the intent of the Arkansas Act is clear: to impede and delay local competition as much as possible. This contrary intent is fulfilled by denying the Arkansas PSC the legal authority it needs to fulfill the role assigned to it by Congress to promote the development of local competition.

The Arkansas State Legislature may limit the activity of the Arkansas PSC, or even abolish it entirely, but it does not have the authority to undo the federal policy represented by the 1996 Act in the process. By rendering the Arkansas PSC unable to fulfill its role under the 1996 Act to promote local competition, the Arkansas Act crosses the line that distinguishes permissible from impermissible state infringement on federal policy.

^{23/} *Id.* at ¶ 137 (emphasis added).

In enacting the 1996 Act, Congress recognized that there would be occasions where, whether for political or practical reasons, state PSCs would be unable to fulfill their statutory obligations. The most extreme example of such a situation would be where a state legislature abolished the state commission entirely. In such a case, if the FCC did not step in and assume the responsibilities of the state commission, local interconnection agreements would be without regulatory review and the incumbent LECs effectively would be deregulated. Such an outcome would clearly contravene the spirit and intent of the 1996 Act. Thus, Congress gave the FCC the right to assume responsibility where the state commission cannot act.^{24/}

Similarly, a state legislature could circumscribe the jurisdiction of a state commission in a manner that *constructively* abolishes the state commission. For instance, if a state legislature enacted a statute that made it impossible for a state commission to arbitrate and approve interconnection agreements, a state commission would be unable to perform its critical function under the Communications Act, and the FCC would have to intercede pursuant to Section 252(e)(5).

In order to fulfill their responsibilities under the Communications Act, state PSCs must be able to arbitrate and approve interconnection agreements. The Communications Act provides that when arbitrating an interconnection agreement, a state commission must meet certain standards, including (1) ensuring that the arbitrated agreement meets the requirements of section 251 and the *Local Competition Order*, (2) establishing any rates for interconnection, services, or network elements pursuant to the terms of section 252(d), and (3) providing a schedule for implementation of the terms and conditions by the parties to the

^{24/} 47 U.S.C. § 252(e)(5).

agreement.^{25/} The Communications Act does not limit the authority of the state PSCs in arbitrating interconnection agreements in any other way. The state PSCs are charged with making determinations concerning discrimination, technical feasibility and the public interest *in furtherance of federal policy*. By denying the Arkansas PSC the discretion to consider and act on all of the issues that could be presented in an interconnection agreement, as it is required to do under Section 252(b)(4)(A) of the Communications Act, the Arkansas Act has constructively abolished the Arkansas PSC for purposes of the federal 1996 Act.

B. THE ARKANSAS ACT THWARTS LOCAL COMPETITION

Some of the most problematic provisions of the Arkansas Act are its restrictions on the Arkansas PSC's ability to consider the full range of available interconnection options and to move beyond the *Local Competition Order* in crafting local competition in Arkansas. Although the *Local Competition Order* takes a flexible approach to the development of local competition, the standards that it establishes, for the most part, are *minimum standards*. For instance, while the FCC specifically mandated that local loops, network interface devices, local and tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions and operator services and directory assistance facilities be provided on an unbundled basis, it also stated that state PSCs "are free to prescribe additional elements, and parties may agree on additional network elements in the voluntary negotiation process."^{26/}

^{25/} *Id.* at § 252(c).

^{26/} *Local Competition Order* at ¶ 366. The Arkansas Act further restricts the ability of private parties to agree on additional network elements in the negotiation process. In Arkansas, Southwestern Bell has no incentive to negotiate further unbundling of network elements if the Arkansas Act prohibits the PSC from ordering further unbundling.

The Arkansas Act deprives the Arkansas PSC of the ability to prescribe any additional interconnection requirements, even though such requirements might be appropriate or necessary to the emergence of local competition in Arkansas. Specifically, the Arkansas Act states that

[e]xcept to the extent required by the [Communications Act] and the [Arkansas Act], the [Arkansas PSC] shall not require an [incumbent LEC] to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a [CLEC] for the purpose of allowing such [CLEC] to compete with the [incumbent LEC] in the provision of basic local exchange service.^{27/}

Moreover, the Arkansas Act states that "[incumbent LECs] shall provide CLECs, at reasonable rates, nondiscriminatory access to operator services, directory listings and assistance, and 911 service *only to the extent required in the [Communications Act]*."^{28/}

Further, the Arkansas Act prohibits the Arkansas PSC from imposing "any interconnection requirements that go beyond those requirements imposed by the [Communications Act] or any interconnection regulations or standards promulgated under the [Communications Act]."^{29/}

Many other points of conflict can be found between the Arkansas Act and the federal 1996 Act. For example:

^{27/} Arkansas Act § 9(d).

^{28/} *Id.* at § 9(h).

^{29/} *Id.* at § 9(i).

- The FCC has found resale restrictions "presumptively unreasonable" under the 1996 Act,^{30/} while the Arkansas Act directs the PSC to approve all resale restrictions permitted by the 1996 Act;^{31/} and
- the 1996 Act directs state PSCs to refuse approval for agreements that discriminate against non-party carriers, but the Arkansas Act precludes the participation of non-parties in arbitration proceedings.^{32/}

Of greatest importance to ACSI is the inability of the PSC to prescribe unbundled network elements or impose new conditions on the incumbent LEC. By limiting the Arkansas PSC to those unbundled network elements mandated by the FCC, the Arkansas Act has completely eviscerated the bona fide request process. Every such request must now be brought to the FCC because the Arkansas PSC is precluded by state statute from considering it.

The hostility of the Arkansas Act toward the federal policy of competition also is displayed in the immediate deregulation which it mandates for the incumbent LECs. At the election of an incumbent LEC, all services other than basic local exchange and access service effectively are deregulated immediately.^{33/} For three years, basic local exchange service and access services are capped at their levels of 12 months ago, are deemed just and reasonable at that level, and may be raised and lowered below that cap at will.^{34/} Thereafter, whenever a competitor enters the local market, even the rate cap restraints are removed from basic local exchange and access services.^{35/}

^{30/} *Local Competition Order* at ¶¶ 939, 962-63.

^{31/} Arkansas Act § 9(g).

^{32/} 47 U.S.C. § 252(e)(2). A more complete listing of the differences between the Arkansas Act and the 1996 Act is contained in the side-by-side chart in Attachment 2.

^{33/} Arkansas Act § 8(c).

^{34/} *Id.* at § 7.

^{35/} *Id.* at § 7(d).

The bias of the Arkansas Act against a genuinely competitive environment for local telecommunications services is apparent. The Arkansas Act recognizes the dynamic nature of a competitive environment and forbids the Arkansas PSC to regulate dynamically. CLECs in Arkansas will only be able to obtain from the Arkansas PSC access to unbundled network elements and interconnection to the extent expressly permitted by the Communications Act and the FCC, regardless of any peculiar market circumstances that exist in Arkansas or of the state of competition in Arkansas. CLECs will be forced to petition the FCC every time they wish to make a bona fide request not previously addressed by the FCC or whenever they need to address a unique problem or opportunity related to the provision of competitive local exchange services in Arkansas. Thus, the FCC will become the *de facto* arbiter of local competition in Arkansas because, unlike the Arkansas PSC, the FCC cannot be bound by the terms or anticompetitive purpose of the Arkansas Act.

C. THE FCC HAS AUTHORITY TO ASSUME JURISDICTION OVER INTERCONNECTION ARBITRATIONS PURSUANT TO SECTIONS 252(E)(5) AND 253(D) OF THE COMMUNICATIONS ACT

In order for states to fulfill their statutory roles under the Communications Act, they must have the freedom to consider bona fide requests for interconnection that go beyond the FCC's *Local Competition Order*. This does not require the Arkansas PSC to grant or deny any specific request for interconnection. But it does require the Arkansas PSC to be able to make "critical decisions concerning a host of issues involving rates, terms and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251."^{36/} When the Arkansas PSC is

^{36/} *Local Competition Order* at ¶ 137.

affirmatively prohibited from considering interconnection options beyond those presented by the FCC in the *Local Competition Order*, the Arkansas PSC, by definition, cannot act to arbitrate interconnection agreements within the meaning of Section 252.

As the FCC recognized in the *Local Competition Order*, "Section 252(e)(5) directs the FCC to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.^{37/} The Arkansas PSC is legally precluded from considering the full range of interconnection options presented in a petition for arbitration because the Arkansas Act denies it the authority to consider and implement anything other than that which the FCC has already provided. In light of the Arkansas Act, the Arkansas PSC cannot accomplish the federal goals set forth in the Communications Act and the *Local Competition Order* -- to "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress."^{38/}

The FCC previously has interpreted a "failure to act" to mean "a state's failure to complete its duties in a timely manner."^{39/} According to this standard, preemption would be

^{37/} *Id.* at ¶ 1269. Section 252(e)(5) states:

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of the proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5).

^{38/} *Local Competition Order* at ¶ 1.

^{39/} *Id.* at ¶ 1285.

limited "to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."^{40/} Pursuant to the Arkansas Act, however, the Arkansas PSC does not have the authority to consider interconnection options submitted for arbitration that go beyond the *Local Competition Order*. ACSI submits that, as a result, the FCC must preempt the authority of the Arkansas PSC -- not because it has failed to act within a reasonable period -- but because it cannot act at all within the meaning of the Communications Act.

In addition, Section 253(a) of the 1996 Act states:

No state or local statute or regulation, or other state or local legal requirements, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.^{41/}

Subsection (d) of Section 253 empowers the FCC to preempt the enforcement of any law or regulation which contravenes Section 253(a). The Arkansas Act is such a law, because it denies ACSI and other competitors the ability to obtain PSC directives mandating incumbent LEC fulfillment of bona fide requests for facilities needed to provide competitive services. By limiting unbundled network elements, the Arkansas Act has the effect of prohibiting the competitive provision of certain telecommunications services. The FCC thus may preempt the Arkansas Act under Section 253(d) as well.

As the FCC stated in the *Local Competition Order*,

the Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to

^{40/} *Id.*

^{41/} 42 U.S.C. § 253(d).

competition in all telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.^{42/}

The Arkansas Act prevents the Arkansas PSC from accomplishing these goals in a meaningful way by attempting to hold competition at bay for as long as possible.

Although a state legislature has complete authority to abolish a state regulatory commission, it does not have the authority to undo the Communications Act in the process. The FCC must assume jurisdiction to protect the federal interest in local competition. Consequently, ACSI respectfully requests that the FCC assume jurisdiction over such cases as they pertain to interconnection agreements for the provision of local telecommunications services in Arkansas.

D. THE ARKANSAS ACT PREVENTS NEW ENTRANTS FROM RECEIVING UNIVERSAL SERVICE FUNDING

Section 5(b) of the Arkansas Act also imposes onerous restrictions on the ability of CLECs such as ASCI to become recipients of universal service funding, in contravention of Section 254(f) of the 1996 Act which provides that states may only regulate universal service funding in a manner which is "not inconsistent" with the FCC's rules,^{43/} and Section 253 of the 1996 Act, which forbids states from erecting barriers to local market entry. Although the FCC has not yet issued final rules implementing the federal universal service program under

^{42/} *Local Competition Order* at ¶ 3.

^{43/} 47 U.S.C. § 254(f).

Sections 254 and 214(e),^{44/} it is evident that the Arkansas requirements will be inconsistent, because they conflict with the requirements of the 1996 Act itself.

Specifically, Section 5(b) of the Arkansas Act imposes three conditions on eligibility for receiving universal service support which are inconsistent with the corresponding requirements contained in Section 214(e) of the 1996 Act. First, Section 5(b)(1) of the Arkansas Act prohibits the Arkansas PSC from designating any "other telecommunication carrier" as an ETC until such carrier accepts "the responsibility to provide service to *all* customers in an [incumbent LEC's] local exchange area" using its own facilities at least in part.^{45/} Section 5(b)(1) goes on to require that the Arkansas PSC find that such a carrier "offers to serve *all customers* in its service area," presumably including both business and all residential customers.^{46/} These restrictions, which effectively disqualify all CLECs that cannot replicate the incumbent LEC's comprehensive local networks or serve most residential customers economically, is flatly inconsistent with Section 214(e)(1)(B) of the 1996 Act, which requires only that an "other telecommunications provider" acting as an ETC "advertise the availability of such services and the charges therefor using media of general distribution."^{47/}

^{44/} *Id.* at § 214(e). The FCC is considering adoption of reforms contained in the *Recommended Decision* adopted by the Federal-State Joint Board in CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service*, on November 7, 1996 ("*Recommended Decision*").

^{45/} Arkansas Act § 5(b)(1) (emphasis added).

^{46/} *Id.* at § 5(b)(1) (emphasis added).

^{47/} 47 U.S.C. § 214(e)(1)(B). Notably, the Joint Board found explicitly that restricting universal service support to incumbent LECs would not be in accord with Section 214(e). *Recommended Decision* at ¶ 158. In addition, the Joint Board determined that

(continued...)

Second, Section 5(b)(2) of the Arkansas Act states that ETCs other than incumbent LECs are eligible for universal service support *only* for the portion of the local network facilities utilized which it "owns and maintains." This restriction is inconsistent with Section 214(e)(1)(A) of the 1996 Act which requires only that an ETC offer services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." Indeed, Section 214(e) makes clear that universal service support is provided for *both* "facilities and services," not only "facilities" as the Arkansas Act contemplates.^{48/}

Third, Section 5(b)(5) of the Arkansas Act disallows any telecommunications carrier other than the incumbent LEC from receiving universal service support until the PSC determines that such carrier's designation as an ETC is "in the public interest." Under the terms of Section 214(e)(2) of the 1996 Act,^{49/} the ability of a PSC to make a public interest determination is expressly limited to areas served by rural telephone companies. Indeed, under the 1996 Act, state commissions are forbidden from requiring separate public interest determinations in non-rural areas.

These restrictions taken in combination have the effect of disqualifying CLECs such as ACSI from qualifying as ETCs and receiving funding from the Arkansas Universal

^{47/}(...continued)

the "plain meaning" of Section 214(e)(1) is that a carrier would be eligible for universal service support if it uses "its own facilities in combination with the resale of specified services" and recommended that the FCC "reject arguments that only those telecommunications carriers that offer service wholly over their own facilities could be eligible for universal service." *Recommended Decision* at ¶¶ 160-161.

^{48/} *Id.* § 214(e)(1).

^{49/} *Id.* at § 214(e)(2).

Service Fund ("AUSF").^{50/} While Section 254 of the 1996 Act and the anticipated FCC rules implementing it admittedly apply only to the federal universal service support program, states may not adopt rules which are "inconsistent" with the federal rules.^{51/} Moreover, pursuant to Section 253 of the 1996 Act, the FCC must preempt state rules which act as a barrier to entry into the local services market.^{52/}

Section 5(b) of the Arkansas Act fails both of these criteria. Despite the fact that Section 5(b) of the Arkansas Act makes the self-serving claim that its terms are "consistent with Section 214(e)(2) of the [1996 Act]," saying it does not make it so. The fact is that the requirements of Section 5(b) of the Arkansas Act are flatly contrary to the corresponding provisions of Section 214(e)(1)-(2) of the 1996 Act. In addition, by providing incumbent LECs with two sources of universal service support (federal *and* state programs), while effectively relegating CLECs to a single (i.e. federal) source of support, the Arkansas Act affords incumbent LECs an insuperable advantage in competing to provide local services in the affected areas. It seems self-evident that such an inherent *de jure* disadvantage will "have the effect of prohibiting the ability of [CLECs] to provide any interstate or intrastate telecommunications service"^{53/} as proscribed by Section 253 of the 1996 Act. The Commission cannot tolerate such a transparent attempt to foreclose telecommunications carriers other than the incumbent LECs from participating in the universal service program.

^{50/} The AUSF is established by Section 4 of the Arkansas Act.

^{51/} 47 U.S.C. § 254(f).

^{52/} *Id.* at § 253.

^{53/} Notably, CLECs effectively would be barred from providing *interstate* access services as well as intrastate or local telecommunications services.

CONCLUSION

The FCC observed in the *Local Competition Order* that "opening [one] of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets."^{54/} This statement underscores the scope of the FCC's efforts to promote local competition. At the end of this process, local competition should exist in *all* markets.

The Arkansas Act will prevent local competition from developing as it should in Arkansas, because the jurisdiction of the Arkansas PSC has been restricted in a way that prevents it from participating as a full partner with the FCC in the effort to implement federal policy and promote competition. As a result, the Arkansas PSC cannot lawfully fulfill its obligations under the Communications Act and the FCC must assume jurisdiction pursuant to Section 252(e)(5) to arbitrate and approve interconnection agreements in Arkansas.

The Commission must affirmatively address efforts by the Arkansas State Legislature to turn back the clock on local competition. Several other states are considering measures that similarly seek to eviscerate the pro-competitive policies of the 1996 Act. If the Arkansas Act is not preempted pursuant to Sections 252(e)(5) and 253(d), then the

^{54/} *Local Competition Order* at ¶ 4.